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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 808 HOLDINGS, LLC, a California) Civil No. 12cv00215 MMA(RBB)
12 limited liability company,)
13 Plaintiff,) **ORDER DENYING PLAINTIFF'S**
14 v.) **MOTION FOR LEAVE TO TAKE EARLY**
15 COLLECTIVE OF DECEMBER 30, 2011) **DISCOVERY [ECF NO. 4]**
16 SHARING HASH)
17 E37917C8EEB4585E6421358FF32F29C)
18 D63C23C910N; DOES 1-54,)
inclusive,)
Defendants.)
_____)

19 The Plaintiff filed a Motion for Leave to Take Early Discovery
20 on February 1, 2012, along with a Memorandum of Points and
21 Authorities and an exhibit [ECF No. 4]. Because no Defendant has
22 been named or served, no opposition or reply briefs have been
23 filed. The Court, on March 1, 2012, issued a minute order
24 addressing Plaintiff's failure to obtain a hearing date before
25 filing its Motion in accordance with the civil local rules [ECF No.
26 5]. The Court sua sponte set a motion hearing for April 23, 2012,
27 at 10:00 a.m. (Mins. 1, Mar. 1, 2012, ECF No. 5.)
28

1 The Court finds the Plaintiff's Motion for Leave to Take Early
2 Discovery suitable for resolution on the papers. See S.D. Cal.
3 Civ. R. 7.1(d)(1). For the reasons discussed below, the Motion is
4 **DENIED.**

5 **I.**

6 **PROCEDURAL HISTORY**

7 Plaintiff 808 Holdings, LLC ("808 Holdings") filed a Complaint
8 on January 26, 2012, against Collective of December 30, 2011
9 Sharing Hash E37917C8EEB4585E6421358FF32F29CD63C23C910N, and DOES
10 one through fifty-four ("Defendants") [ECF No. 1]. The next day,
11 808 Holdings filed an Amended Complaint, erroneously captioned as
12 the "Complaint" [ECF No. 3]. The Court construes this as the
13 amended, operative pleading.

14 In the Amended Complaint, 808 Holdings indicates that it does
15 business under the names "Cody Media" and "SeanCody.com," and it
16 purports to be the registered owner of, and hold the exclusive
17 rights to, the copyright of the motion picture, "Brandon & Pierce
18 Unwrapped." (Am. Compl. 1, 3, ECF No. 3.) First, 808 Holdings
19 alleges a claim for copyright infringement, stating that Defendants
20 reproduced and distributed Plaintiff's copyrighted material through
21 the Internet without authorization of the Plaintiff. (Id. at
22 27-28.) Second, 808 Holdings pleads contributory copyright
23 infringement, alleging that Defendants illegally obtained the
24 copyrighted motion picture and assisted others in doing the same.
25 (Id. at 28-30.) Third, Plaintiff argues that the Defendants were
26 negligent in failing to adequately secure their Internet access to
27 prevent its unlawful use by others. (Id. at 30-31.)

1 On February 1, 2012, 808 Holdings filed this Motion for Leave
2 to Take Early Discovery to learn the identities of the Doe
3 Defendants from their respective Internet Service Providers
4 ("ISPs"). (Mot. Leave Take Early Disc. 1, ECF No. 4.)¹ In
5 particular, the Plaintiff seeks an order directing the ISPs to
6 release the subscriber's identifying information. (Id. Attach. #1
7 Mem. P. & A. 1.) Also, 808 Holdings seeks leave to serve
8 interrogatories on, and take the depositions of, the individuals
9 identified by the ISPs to determine whether the actual Internet
10 subscriber is the proper defendant. (Id.) Plaintiff attached to
11 its Motion a list of the Internet Protocol ("IP") addresses
12 associated with subscribers it hopes to identify as defendants.
13 (Id. Attach. #2 Ex. A, at 2-3.) The list does not indicate the
14 city and state attributable to each IP address. (See id.)

15 II.

16 FACTUAL ALLEGATIONS

17 Plaintiff 808 Holdings alleges in its Amended Complaint that
18 the fifty-four Doe Defendants collectively infringed its
19 copyrighted work using a BitTorrent file transfer protocol. (Am.
20 Compl. 2, ECF No. 3.) The Plaintiff generally contends that each
21 time a Defendant distributes the motion picture to others, those
22 individuals can distribute that infringing copy to other people in
23 "an interconnected collective," which builds on prior
24 infringements. (Id.) The Defendants are purportedly a collection
25 of "BitTorrent users" or "peers" whose computers are connected for
26

27 ¹ Because the pages attached to the Motion are not paginated,
28 the Court will cite to the Motion for Leave to Take Early Discovery
using the page numbers assigned by the electronic case filing
system.

1 the purpose of sharing a file, otherwise known as a "swarm." (Id.
2 at 3.) Plaintiff alleges that each BitTorrent swarm is associated
3 with a particular "hash," which has a specific identifier for the
4 file. (Id.) The sharing hash associated with the motion picture
5 is E37917C8EEB4585E6421358FF32F29CD63C23C91. (Id. at 4.)

6 **A. BitTorrent Protocol**

7 According to 808 Holdings, the BitTorrent protocol is
8 distinguishable from previously used peer-to-peer file sharing
9 technology, utilized by Napster or Limewire, because it "allows for
10 higher transfer speeds by locating pieces (or 'bits') of the file
11 already present on other users' computers and downloading them
12 simultaneously." (Id. at 23.) "This is done by joining into the
13 'swarm,' or collective, of peers to download and upload from each
14 other simultaneously." (Id.) This process results in faster
15 downloads than peer-to-peer file sharing technology. (Id.)

16 Plaintiff describes the process of downloading and uploading
17 files through a BitTorrent protocol as "quick and efficient."
18 (Id.) When a user downloads a media file, he or she opens the file
19 on a BitTorrent client application; the user then extracts a list
20 with tracker locations that connect to IP addresses that are
21 currently running the BitTorrent software and offering to
22 distribute the file. (Id.) The downloader's BitTorrent program
23 then begins to download the media file automatically. (Id.)

24 **B. Forming a Swarm**

25 In its Amended Complaint, 808 Holdings maintains that a swarm
26 begins with an initial user called the "seeder" who begins to share
27 a file with a torrent swarm. (Id.) New members of the swarm
28 connect to the seeder to download the media file, which creates a

1 digital copy of the file; the process repeats as new members join
2 the swarm, increasing the number of users in the swarm. (Id.)
3 Each member both acquires and redistributes the media file by
4 simultaneously uploading and downloading portions of the same
5 digital copy with the other members. (Id. at 23-24.) Therefore,
6 Plaintiff contends that even if the original seeder leaves the
7 swarm, the media file can continue to be downloaded by old and new
8 members. (Id. at 24.)

9 **C. The December 30, 2011 Sharing Hash**

10 Plaintiff claims that on December 30, 2011, each of the
11 Defendants "republished, duplicated, and replicated the exact same
12 copy and exact same hash file." (Id. at 4.) Because all the
13 Defendants are associated with this hash, 808 Holdings alleges that
14 each Defendant was a member of the same collective swarm. (Id. at
15 25-26.) Therefore, 808 Holdings maintains that they "acted
16 collectively, and in concert, in effectuating the illegal and
17 unauthorized sharing of Plaintiff's copyrighted work." (Id. at
18 25.) The Plaintiff contends the Doe Defendants acted in unison:

19 Defendants engaged in their copyright infringement
20 scheme together. They all used the same torrent-sharing
21 technology to coordinate their collective copyright
22 theft; they were all members of the same exact swarm on
23 the same exact date; they all used the same exact tracker
24 file; they all shared and republished the same exact
25 motion picture; and they all shared the same exact hash
26 file of the Motion Picture with each other and other
27 individuals on the same exact date, December 30, 2011.

28 (Id. at 4.)

29 **III.**

30 **LEGAL STANDARDS**

31 Absent a court order, discovery is not generally permitted
32 before the parties have conferred pursuant to Federal Rule of Civil

1 Procedure 26(f). Fed. R. Civ. P. 26(d)(1). Yet, "in rare cases,
2 courts have made exceptions, permitting limited discovery to ensue
3 after filing of the complaint to permit the plaintiff to learn the
4 identifying facts necessary to permit service on the defendant."
5 Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal.
6 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
7 1980)). Courts grant these types of requests when the plaintiff
8 shows good cause for the discovery. Semitool, Inc. v. Tokyo Elec.
9 Am., Inc., 208 F.R.D. 273, 275-76 (N.D. Cal. 2002).

10 When the defendants' identities are unknown at the time the
11 complaint is filed, courts may grant plaintiffs leave to take early
12 discovery to determine the defendants' identities "unless it is
13 clear that discovery would not uncover the identities, or that the
14 complaint would be dismissed on other grounds." Gellespie, 629
15 F.2d at 642. "A district court's decision to grant discovery to
16 determine jurisdictional facts is a matter of discretion."
17 Columbia Ins. Co., 185 F.R.D. at 578.

18 District courts apply a three-factor test when considering
19 motions for early discovery to identify certain defendants. Id. at
20 578-80. First, the plaintiff should "identify the missing party
21 with sufficient specificity such that the Court can determine that
22 defendant is a real person or entity who could be sued in federal
23 court." Id. at 578. Second, the movant must describe "all
24 previous steps taken to locate the elusive defendant" to ensure
25 that the plaintiff has made a good faith effort to identify and
26 serve process on the defendant. Id. at 579. Third, plaintiff
27 should establish that its suit against the defendant could
28 withstand a motion to dismiss. Id. "[T]o prevent abuse of this

1 extraordinary application of the discovery process and to ensure
 2 that the plaintiff has standing," plaintiff must show that some act
 3 giving rise to liability actually occurred and that the discovery
 4 is aimed at identifying the person who allegedly committed the act.
 5 Id. at 579-80.

6 IV.

7 DISCUSSION

8 Plaintiff seeks an order permitting it to subpoena twenty-
 9 three ISPs for documents and information sufficient to identify the
 10 subscribers of the assigned IP addresses listed in Exhibit A to its
 11 Motion: (1) AT&T d/b/a SBC Internet Services, (2) BellSouth.net,
 12 (3) CABLE ONE, Inc., (4) CenturyTel Internet Holdings, (5) Charter
 13 Communications, (6) Comcast Cable, (7) Cox Communications, (8)
 14 Cyber Wurx, LLC., (9) Earthlink, (10) Embarq Corporation, (11) Fuse
 15 Internet Access, (12) HickoryTech Corporation, (13) Insight
 16 Communications Company, (14) The Iserv Company LLC, (15) Level 3
 17 Communications, (16) Optimum Online, (17) Qwest Communications,
 18 (18) RCN Corporation, (19) SureWest Broadband, (20) Time Warner
 19 d/b/a Road Runner, (21) Verizon Internet Services, (22)
 20 WideOpenWest, and (23) Windstream Communications. (Mot. Leave Take
 21 Early Disc. Attach. #1 Mem. P. & A. 2, ECF No. 4.)

22 Exhibit A to Plaintiff's Motion lists the "Host IP address,"
 23 the "Hit Date(UTC)," the "ISP," and the "FileHash" for each Doe
 24 Defendant. (Id. Attach. #2 Ex. A, at 2-3.) 808 Holdings does not
 25 identify the city and state where these IP addresses are located.
 26 (See id.) Consequently, the only identifying information for the
 27 Doe Defendants is their IP addresses and the corresponding ISP.

1 **A. Identification of Missing Parties with Sufficient Specificity**

2 First, Plaintiff must identify the Doe Defendants with enough
3 specificity to enable the Court to determine that each defendant is
4 a real person or entity who would be subject to the jurisdiction of
5 this Court. See Columbia Ins. Co., 185 F.R.D. at 578. In its
6 Motion for Leave to Take Early Discovery, 808 Holdings asserts it
7 has "sufficiently identified individuals who are real persons" that
8 Plaintiff can sue in this federal district court. (Mot. Leave Take
9 Early Disc. Attach. #1 Mem. P. & A. 3, ECF No. 4.) It has
10 "observed and documented the infringement of its registered work by
11 the individuals identified as DOES" (Id.) Also, 808
12 Holdings contends that the discovery sought is necessary to
13 ascertain the identities of the Defendants. (Id.)

14 Some district courts in the Ninth Circuit have determined that
15 a plaintiff identifies Doe defendants with sufficient specificity
16 by providing the unique IP addresses assigned to an individual
17 defendant on the day of the allegedly infringing conduct, and by
18 using "geolocation technology" to trace the IP addresses to a
19 physical point of origin. See Openmind Solutions, Inc. v. Does
20 1-39, No. C-11-3311 MEJ, 2011 U.S. Dist. LEXIS 116552, at *5-6
21 (N.D. Cal. Oct. 7, 2011); Pink Lotus Entm't v. Does 1-46, No. C-11-
22 02263 HRL, 2011 U.S. Dist. LEXIS 65614, at *6-7 (N.D. Cal. June 21,
23 2011). Others have found that merely identifying the IP addresses
24 assigned to the defendants on the day of the purported infringement
25 is sufficient to satisfy the first factor. See MCGIP, LLC v. Does
26 1-149, No. C-11-02331 LB, 2011 U.S. Dist. LEXIS 85363, at *4-5
27 (N.D. Cal. Aug. 15, 2011) (opinion by Judge Beeler); First Time
28

1 Videos LLC v. Does 1-37, No. C-11-01675 LB, 2011 U.S. Dist. LEXIS
2 42376, at *5 (N.D. Cal. April 14, 2011) (opinion by Judge Beeler).

3 This Court agrees with those that have found that a plaintiff
4 has identified Doe defendants with sufficient specificity where "it
5 used geolocation technology to trace [defendants'] IP addresses to
6 a point of origin within the state of California." Openmind
7 Solutions, 2011 U.S. Dist. LEXIS 116552, at *6 (citing Pink Lotus
8 Entm't, 2011 U.S. Dist. LEXIS 65614, at *6-7) (holding that
9 plaintiff satisfied its burden to identify the Doe defendants with
10 specificity by using geolocation technology to trace the
11 defendants' IP addresses to locations in California). This
12 Plaintiff made similar efforts in another case. See 808 Holdings,
13 LLC v. Collective of December 29, 2011 Sharing Hash, Case No. 12-
14 cv-0186 MMA(RBB) (S.D. Cal. Jan. 23, 2012) (motion for leave to
15 take early discovery ex. A) (ECF No. 4). It did not here. And
16 Plaintiff failed to offer any explanation for not attempting to
17 learn whether the Doe Defendants have Internet IP addresses
18 traceable to this judicial district. These shortcomings, alone,
19 preclude granting Plaintiff's request for expedited discovery.

20 **B. Previous Attempts to Locate Defendants**

21 Next, 808 Holdings must describe all prior steps it has taken
22 to identify the Doe Defendants in a good faith effort to locate and
23 serve them. See Columbia Ins. Co., 185 F.R.D. at 579. Plaintiff
24 generally maintains that there are no other practical measures
25 available to determine the identities of the Doe Defendants. (Mot.
26 Leave Take Early Disc. Attach #1 Mem. P. & A. 4, ECF No. 4.) "Due
27 to the nature of on-line transactions, Plaintiff has no way of
28 investigating the identities of the potential Defendants except via

1 third-party subpoena to the ISP." (Id.) This statement is
2 disingenuous.

3 In its Motion, 808 Holdings does not address the efforts it
4 made to learn the IP addresses. Nor does it provide the Court with
5 a declaration describing these attempts. Plaintiff identified the
6 IP addresses from which each Doe Defendant connected to the
7 Internet and recorded the date and time each Defendant accessed
8 Plaintiff's motion picture. (See id. at 5.) Plaintiff apparently
9 conducted "a simple search on a publically available database" to
10 determine which ISP controls the particular IP addresses. (See
11 id.) This description, however, is vague and does not describe why
12 additional identifying information is not included. See Openmind
13 Solutions, 2011 U.S. Dist. LEXIS 116552, at *7-10 (considering
14 plaintiff's detailed account of, and declaration describing, the
15 efforts it engaged in to locate the doe defendants).

16 Furthermore, 808 Holdings does not state whether it used
17 geolocation technology to trace the Doe Defendants' IP addresses.
18 If not, Plaintiff does not explain why it did not make further
19 efforts to locate the Defendants. In similar contexts, other
20 Plaintiffs have used geolocation technology to trace IP addresses
21 to locations in California. See id. at *6 (citing Pink Lotus
22 Entm't., 2011 U.S. Dist. LEXIS 65614, at *6-7). As mentioned
23 above, this Plaintiff and counsel appear to have done the same in a
24 related case involving the same copyrighted work. See 808
25 Holdings, LLC v. Collective of December 29, 2011 Sharing Hash, Case
26 No. 12-cv-0186 MMA(RBB) (motion for leave to take early discovery
27 ex. A) (ECF No. 4).

28

1 The failure to make a good faith effort to locate the Doe
2 Defendants requires that Plaintiff's Motion be denied.

3 **C. Ability to Withstand a Motion to Dismiss**

4 Finally, to be entitled to early discovery, 808 Holdings must
5 demonstrate that its Amended Complaint can withstand a motion to
6 dismiss. See Columbia Ins. Co., 185 F.R.D. at 579.

7 In its Motion for Leave to Take Early Discovery, the Plaintiff
8 declares that it has stated a prima facie claim for copyright
9 infringement that can withstand a motion to dismiss. (Mot. Leave
10 Take Early Disc. Attach. #1 Mem. P. & A. 4, ECF No. 4.) According
11 to 808 Holdings, it has adequately alleged that Defendants engaged
12 in the unauthorized reproduction and distribution of its motion
13 picture, and that Plaintiff owns the registered copyrights for the
14 motion picture. (Id. (citing 17 U.S.C. §§ 106(1)(3)).) Also,
15 without a citation to supporting authority showing any "duty" to
16 copyright owners, 808 Holdings contends it has sufficiently pleaded
17 a negligence cause of action based on the Defendants' failure to
18 secure their Internet access, which enabled the copyright
19 infringements. (Id.)

20 **1. Lack of personal jurisdiction**

21 Exhibit A to Plaintiff's Motion does not identify the city and
22 state that corresponds to each IP address. (See id. Attach. #2 Ex.
23 A, at 2-3, ECF No. 4.) The only identifying information 808
24 Holdings provides is the IP address for each Defendant and the
25 corresponding ISP; the hit date and file hash are alleged in the
26 Amended Complaint and do not provide further identifying details
27 about the Doe Defendants. Plaintiff does not address its failure
28 to investigate or identify the location for each IP address in its

1 Motion. The Court is unable to determine whether any IP addresses
2 are located in the State of California. 808 Holdings has not
3 persuaded the Court that the Amended Complaint can survive a motion
4 to dismiss for lack of personal jurisdiction. See Celestial, Inc.
5 v. Swarm Sharing Hash 8AB508AB0F9EF8B4CDB14C6248F3 C96C65BEB882 on
6 December 4, 2011, No. CV 12-00204 DDP(SSx), 2012 U.S. Dist. LEXIS
7 41078, at *5 (C.D. Cal. Mar. 23, 2012).

8 The Plaintiff bears the burden of establishing jurisdictional
9 facts. See Columbia Ins. Co., 185 F.R.D. at 578 (citing Wells
10 Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th
11 Cir. 1977)). Yet, remarkably, in its Motion, 808 Holdings does not
12 discuss whether this Court has personal jurisdiction over
13 Defendants. In its Amended Complaint, however, Plaintiff asserts
14 that the Doe Defendants are subject to personal jurisdiction in
15 this district because they took the "affirmative action of both
16 downloading and uploading" the motion picture, which "contained
17 Plaintiff's business address in this jurisdiction," (Am.
18 Compl. 2, ECF No. 3.) Thus, Plaintiff maintains that "Defendants
19 knew or should have known . . . that the copyright belonged to an
20 entity residing in this jurisdiction and thus [they] expressly
21 targeted their infringing actions and caused damages" in
22 California. (Id.)

23 Noticeably, from Plaintiff's Amended Complaint, it is
24 impossible to determine how many of the fifty-four Doe Defendants
25 reside in California or in this judicial district. (Id.) This
26 Court must balance the need for discovery against the interests of
27 justice, which includes consideration of the prejudice to the ISP
28 and to the Doe Defendants. See Semitool, 208 F.R.D. at 276.

1 Plaintiff has not alleged sufficient facts to show that it can
2 withstand a motion to dismiss for lack of personal jurisdiction as
3 to all fifty-four Doe Defendants. There is no indication of what
4 cities and states are associated with Defendants' IP addresses.
5 See Celestial, 2012 U.S. Dist. LEXIS 41078, at *5-6 (denying
6 request for early discovery because the complaint could not
7 withstand a motion to dismiss for lack of personal jurisdiction
8 even though all of the IP addresses were located in California).

9 **2. Improper venue**

10 In the same vein, 808 Holdings has not shown that its Amended
11 Complaint can survive a motion to dismiss for improper venue
12 because it is unclear how many of the IP addresses within this
13 judicial district. As discussed, Plaintiff has not provided the
14 Court with the cities and states that correspond to the IP
15 addresses it lists in Exhibit A to its Motion.

16 Plaintiff alleges that venue in this district is proper as to
17 all Defendants under 28 U.S.C. §§ 1391(b)(2), 1400(a). (See Am.
18 Compl. 3, ECF No. 4.) "The venue of suits for infringement of
19 copyright is not determined by the general provision governing
20 suits in the federal district courts, rather by the venue provision
21 of the Copyright Act." Goldberg v. Cameron, 482 F. Supp. 2d 1136,
22 1143 (N.D. Cal. 2007). Civil actions for copyright infringement
23 "may be instituted in the district in which the defendant or his
24 agent resides or may be found." 28 U.S.C.A. § 1400(a) (West 2006).
25 An individual "resides" for venue purposes in the district of his
26 domicile. 17 James Wm. Moore, et al., Moore's Federal Practice, §
27 110.39[2], at 110-76 (3d ed. 2011). A defendant is "found" for
28 venue purposes where he is subject to personal jurisdiction. Id.

(footnote omitted); see Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1126 (9th Cir. 2010) ("This circuit interprets [28 U.S.C. § 1400(a)] to allow venue in any judicial district where, if treated as a separate state, the defendant would be subject to personal jurisdiction.").

Plaintiff fails to address venue in its Motion. In the Amended Complaint, however, 808 Holdings asserts venue is proper because although the true identities of the Defendants are unknown, "on information and belief, each Defendant may be found in this District and/or a substantial part of the infringing acts complained of occurred in this District." (Am. Compl. 3, ECF No. 3.) 808 Holdings intentionally muddies the distinction between whether any Defendant is found in this district and whether infringing acts occurred here. Plaintiff has not shown that it can withstand a motion to dismiss for improper venue pursuant to 28 U.S.C. § 1406(a), especially when there is no alternate district to which a transfer would be appropriate. See 28 U.S.C.A. § 1406 (West 2006).

3. Misjoinder

In addition to personal jurisdiction and venue, 808 Holdings has failed to show that its claims can withstand a motion to dismiss for improper joinder. Fed. R. Civ. P. 20(a); see Celestial, 2012 U.S. Dist. LEXIS 41078, at *7 n.3. Although the Ninth Circuit has not ruled on whether permissive joinder is proper in cases where Doe defendants collectively download and upload the same file using BitTorrent technology, several recent district court cases in the circuit have found joinder improper. See Celestial, 2012 U.S. Dist. LEXIS 41078, at *7 n.3 (citing recent

1 cases finding misjoinder); see also Liberty Media Holdings, 2012
2 U.S. Dist. LEXIS 24232, at *16-17. In its conclusory pleading and
3 Motion, 808 Holdings has not established that the Amended Complaint
4 can withstand a motion to dismiss for misjoinder.

5 V.

6 **CONCLUSION**

7 For all of these reasons, Plaintiff's Motion for Leave to Take
8 Early Discovery [ECF No. 4] is **DENIED**. See Columbia Ins. Co., 185
9 F.R.D. at 578 (stating that a whether to grant discovery to
10 determine jurisdictional facts is a matter of discretion).

11 **IT IS SO ORDERED.**

12 Dated: May 4, 2012

13 
RUBEN B. BROOKS
United States Magistrate Judge

14 cc: Judge Anello
15 All Parties of Record
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